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In the Supreme Court of the United States

OCTOBER TERM, 1958.

No. 681

JOHN E. MOORE,
Petitioner,

vs.

THE STATE OF OHIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio.

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To the Supreme Court of Ohio.

JOHN E. MOORE, petitioner, prays that a writ of certiorari issue to review a final judgment of the Supreme Court of Ohio entered in the above entitled case on October 15th, 1958, and its refusal to reconsider entered on November 12th, 1958.

OPINIONS BELOW.

The Journal Entry of judgment of the Court of Common Pleas is unreported and appears in the transcript of the record. The opinion of the Court of Appeals of Summit County, Ohio, is reported in 78 Ohio Law Abstract 380. The decision of the Supreme Court of Ohio is reported in 168 O. S. 270, 31 Ohio Bar No. 43, November 10, 1958, and is printed in Appendix A. The decision of the Supreme Court of Ohio denying the application for rehearing appears in 31 Ohio Bar, No. 44, November 17, 1958, and is printed in Appendix B hereto.

JURISDICTION.

The judgment of the Supreme Court of Ohio was entered on October 15, 1958, and its denial of a rehearing was rendered on November 12, 1958.

The decision below is reviewable upon petition for certiorari under 28 U. S. C., Paragraph 1254 (1).

QUESTIONS PRESENTED.

1. Was the application of the doctrine of entrapment by the Ohio Courts in accord with decisions of this Court, particularly *Sherman v. U. S.*, 356 U. S. 369.

2. Was petitioner placed in jeopardy twice for one act.

3. Did the Appellate Court place petitioner in double jeopardy by using evidence introduced under counts in an indictment upon which he was acquitted to supply deficiency of evidence in the counts upon which he was convicted and thereby sustain the conviction.

4. Was the conduct of petitioner criminal.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendments to U. S. Constitution, Article 14, Section 1, as follows:

"Nor shall any State deprive any person of life, limb or property without due process of law."

5th Amendment to the U. S. Constitution as follows:

"Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

STATEMENT OF THE CASE.

Petitioner is a resident of the City of Akron, Ohio, married and the father of two children.

On May 6, 1957, at about 10:30 o'clock, A. M. he was seated in an automobile parked on a street in the City of Akron, when two police officers of the City of Akron, Charles Valley and Clyde Longacre, approached him and ordered him out of his automobile and searched him and his automobile. Petitioner was doing nothing illegal at the time of the search and nothing illegal was found in his possession or in his car.

The officers had no search warrant, no affidavit for his arrest, and no reasonable grounds for searching him (R. 35 to 37).

During the search, petitioner was ordered to open his pocketbook, which he did, displaying a quantity of money which attracted the officers' attention and caused them to express admiration for it (R. 80 to 81).

At 1:00 o'clock, P. M. of the same day, these two police officers came to petitioner's apartment, whereupon, he gave Officer Valley a hundred dollar bill, which the Officer returned to petitioner saying it was too big. Thereupon, he gave Officer Valley a total of one-hundred dollars in lesser denominations—one-half of which Officer Valley gave to Officer Longacre. No reason for giving the money was stated by petitioner and he made no request for any official action or favors from the Officers in return for the money (R. 22). Thereupon, the Officers asked petitioner what he expected for the money, and he stated "if anything big happens, like a raid, let me know" (R. 25).

In the departmental report made by the Officers, at a later date, the words "like a raid" do not appear, but only

the statement "if anything big happens let me know." (State's Exhibits 8 and 9, R. 134 to 135.) Petitioner was not arrested at that time.

A week later the same Officers returned to petitioner's apartment, equipped with a miniature recording device concealed in their clothing, and not finding him home sought him out, and then all returned to his apartment. Thereupon, another Hundred Dollars exchanged hands.

Petitioner was not immediately arrested, but later that same day an affidavit charging him with bribery was filed in the Municipal Court of Akron, Ohio, and warrant for his arrest was issued.

Petitioner was denied a preliminary hearing in the Municipal Court when the prosecution submitted the matter to the Grand Jury, who returned an indictment containing four counts of bribery, the first two counts reciting the giving of Fifty Dollars each to the Officers on May 6th, 1957, and the third and fourth counts reciting the giving to the Officers of Fifty Dollars each on May 13, 1957.

On trial in the Common Pleas Court of Summit County, Ohio, the only evidence offered was the testimony of the two officers and the introduction of the money in evidence. The jury returned a verdict acquitting the petitioner on counts three and four of the indictment and convicting him on counts one and two. Thereafter, petitioner was sentenced to the Ohio Penitentiary for a term of not less than one year nor more than ten years on each of the first and second counts in the indictment, the sentences ordered to be served concurrently.

The conviction was affirmed by the Court of Appeals and the Supreme Court of Ohio refused to review it.

PRESENTATION OF THE FEDERAL QUESTION.

(a) In the Court of Common Pleas, Summit County, Ohio.

At the conclusion of the prosecution's evidence, petitioner moved for a dismissal on each of the four counts of the indictment, and his motion was overruled (R. 101). Before argument, petitioner requested the Court to submit to the jury, in writing, a charge on the law of entrapment, which was denied (R. 101). Thereafter, the trial Court charged the jury on the law of entrapment, but not in accord with petitioner's request nor in accord with decisions of this Court (R. 101). The petitioner also moved the Court to withdraw, from the consideration of the jury, any statements made by the petitioner to the police officers, for the reason that there was a failure to establish the corpus delicti (R. 101).

Thereafter, petitioner moved for a new trial as to counts one and two only of the indictment, and the same was overruled by the Court.

(b) In the Court of Appeals for the Ninth Judicial District of Ohio.

Petitioner assigned as error the Court's refusal to charge on the law of entrapment as requested by Appellant, its refusal to discharge him, and its denial to him of due process of law.

(c) In the Supreme Court of Ohio.

Petitioner assigned as error the action of the Court of Appeals in relying on evidence offered on the counts in the indictment upon which petitioner was acquitted to supply deficiency of evidence in the counts upon which he was convicted, thus placing him twice in jeopardy; that the evidence failed to establish that a crime was committed; refusal of the trial Court to properly apply the law of entrapment, and the denial of due process of law.

REASONS FOR GRANTING THE WRIT.

1.

The trial Court should have sustained petitioner's motion to discharge him at the conclusion of the State's evidence for the reason that the defense of entrapment was established as a matter of law.

The matter was submitted to the Court and to the jury solely upon the testimony of the two police officers, so there was no problem of weighing their evidence against petitioner's evidence, and the Court should have decided as a matter of law from the uncontradicted evidence that the petitioner was entrapped.

The peculiar conduct of the police officers in searching petitioner and his automobile in broad day light on a public street when they had no grounds for believing that he was engaged in any unlawful act, followed by their visit to his home where they had no business; receiving a hundred dollar bill and returning it only for the reason that it was too large; their failure to arrest him at the time, if any offense was committed, their follow-up of a visit to his home a week later, and not finding him home, searching for him in other parts of the City, equipping themselves with a hidden wire recorder, coupled also with the fact that each of the two officers had known him for approximately ten years, had never arrested him for any gambling violation, and the absence of proof in the record of any previous conviction for any offense, stood uncontradicted; and presented the question of entrapment to the Court as a matter of law. Thereafter upon failure of the Court to sustain his motion to discharge him, the petitioner requested that the Court charge the jury on the subject of entrapment as follows (R. 102 and 137):

"If the jury are satisfied that prior to the commission of the acts alleged that the defendant never conceived any intention of committing these offenses, or any similar offense, but that the police officers incited and by suggestions and representations lured him to commit the offenses alleged in order to entrap, arrest and prosecute the defendant therefor, then these facts are fatal to the prosecution of these offenses, and the defendant is entitled to a verdict of not guilty."

In *Capuano v. U. S.*, 9 F. (2nd) 41, it was held error for the Court to refuse such an instruction.

The conduct involved in this case was "the product of the creative activity" of the police officers as it was in *Sherman v. U. S.*, 356 U. S. 369, wherein this Court held that the conviction should be set aside on the ground that as a matter of law the defense of entrapment was established.

The trial Court refused the request to charge the jury in writing but instead in its general charge placed the burden upon the petitioner to establish the entrapment.

2.

Petitioner was indicted on four counts involving his actions on two separate days. Actually his conduct should be the subject for examination on only two counts involving May 6, 1957, and May 13, 1957. His act of giving a Hundred Dollar bill to one officer, and then receiving it back because it was too large for the officer, and giving smaller denominations, did not constitute two separate acts merely because two police officers shared the money. To so indict him was to place him in jeopardy twice for one act on each of the two occasions and is contrary to applicable decisions of this Court. *Lardner v. United States*, decided by this Court December 15, 1958.

3.

Thereafter, on appeal to the Court of Appeals of the Ninth Judicial District of Ohio, that Court erroneously assumed that the appeal involved the full four counts of the indictment, including the two counts upon which petitioner was acquitted, despite petitioner's notice of appeal on counts one and two only. That Court proceeded to review the entire evidence involving the two separate days and the four individual counts and lumped it all together to find sufficient grounds for affirming the conviction. By so doing, the Court of Appeals thus placed petitioner in jeopardy twice on counts three and four of the indictment.

4.

It is also contended that the conduct of the defendant and the words used by him do not constitute a crime. The language: "if anything big happens like a raid, let me know" is vague and nebulous, particularly where it was accompanied by a showing that knowledge of a raid would be valueless to petitioner; that the officers were familiar with the contents of his apartment, his whereabouts, and knowledge of a raid by anyone or at any time would be entirely lacking in value to petitioner, and thereby constitutes no attempt to influence official duty of the officers to the benefit of petitioner. No request for immunity from arrest for himself or others was made.

CONCLUSION.

Essential liberties were denied to petitioner. The presumption of innocence should have prevailed. Conduct of the police was calculated to induce him to violate law. His immunity from illegal search was violated. He was denied judicial hearings and rulings to which he was entitled. He is sentenced to imprisonment for imprudent conduct and not for illegal conduct. The cumulative effect is a denial of due process of law which calls for the allowance of the writ as prayed for.

Respectfully submitted,

C. C. LIPPS,

Attorney for Petitioner.

APPENDIX A.

Judgment of The Supreme Court of the State of Ohio.

(October 15, 1958.)

This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Summit County, upon the motion of the appellee to dismiss the appeal, filed as of right herein, and was argued by counsel.

On consideration whereof, it is ordered and adjudged that said appeal be, and the same hereby is, dismissed for the reason no debatable constitutional question is involved in said cause.

It is further ordered and adjudged that the appellee recover from the appellant its costs herein expended, taxed at $ .....

ORDERED, That a special mandate be sent the Court of Common Pleas of Summit County, to carry this judgment into Execution.

ORDERED, That a copy of this entry be certified to the Clerk of the Court of Appeals of Summit County, "for entry."

APPENDIX B.

Order of the Supreme Court of Ohio Denying Application for Rehearing.

(November 12, 1958.)

Rehearing Docket:

Upon consideration of the above application for rehearing, it is ordered by the Court that rehearing be, and the same hereby is, denied.